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T H E
A R G U M E N T
O F
ALEXANDER WEDDERBURN, Esq;
HIS MAJESTY'S SOLICITOR GENERAL,
IN THE
C A U S E
O F
LORD POMFRET *against* SMITH;

Which was tried at the Bar of the Court of King's-Bench, Westminster;

Before LORD CHIEF JUSTICE MANSFIELD, and MR.
JUSTICE WILLES;

On Saturday the 7th, and Monday the 9th of November 1772;

BY A
SPECIAL JURY OF THE COUNTY OF YORK,

On the following Issue directed by the Court of Chancery, viz.

*" Whether the Ground within the Manor of Healaugh, in Swaledale, in
" the County of York, lying and being between a certain Place there
" called Swinnergill and a Place called East Gill, (in which the Lead
" Mine in Dispute is situate) be Part of the Commons or Wastes of
" the said Manor, or not?"*

On which Issue a VERDICT was found for Mr. SMITH, *" that the
" said Ground was not, nor is, Part of the Wastes of the said Manor."*

PRINTED in the YEAR M,DCC,LXXIII.

THE ARGUMENT

OF
ALEXANDER WEDDERBURN ESQ.

HIS MAJESTY'S SOLICITOR GENERAL

IN THE

CASE OF

Lord Ponteridge against Smith;

Before Lord Eldon, Lord Stowell, and Mr.



On Saturday the 11th and Monday the 13th of November 1792.

IN THE
SPECIAL JURY OF THE COUNTY OF YORK.

Of the following facts certified by the Court of Chancery, viz.
That the Defendant entered the Manor of Hotham, in Southdale, in
the County of York, and being there a certain Piece of Land
which he had and a Piece called Red Oak (or rather the Land
of Red Oak) in Part of the Manor or Village of
Hotham, and being there
On which Piece of Land was found for Mr. Smith "Red Oak"
"Red Oak" was not Mr. Smith's but of the Manor of Hotham.

Printed in the Year 1800.

ADVERTISEMENT.

THE following speech makes its appearance under very considerable disadvantages.—To do it justice, it would be necessary to print that of the Attorney-General, (who opened lord *Pomfret's* cause,) and also the evidence produced on the part of his lordship, as well as the remainder of the trial: this was originally intended, but the design was afterwards dropped, as it would have produced a folio volume, and greatly added to the immense expence with which Mr. *Smith* has been loaded during the progress of his contest with lord *Pomfret*; this must serve as an apology to Mr. Solicitor-General, as several parts of the following speech have allusions to his opponent's arguments, and to facts, which arose in the former part of the trials, allusions that had great force and beauty in the delivery, but which must, in a great measure, be lost to those who had not the pleasure of hearing them.—The speaker did ample justice to the subject; he fully exerted those great powers for which he is so justly distinguished; he was thoroughly acquainted with the series of hardships Mr. *Smith* had sustained in defence of his property, after a peaceable possession of more than thirty years; and was sensible that lord *Pomfret*, or his agents, had made use of every method, (which the practice of the courts but too well enabled him) to delay, harass, and if possible, ruin Mr. *Smith* by repeated applications to the courts below, upon every trivial occasion, and by presenting no less than three Appeals to the House of Lords, in the course of two years, which were attended with an enormous expence, and for which Mr. *Smith* never did, nor could, receive the least compensation.

THE

THE first trial, in 1770, though had at *York*, (and where Mr. *Smith* also obtained a verdict,) necessarily occasioned a vast expence; but on lord Pomfret's insisting in 1772, to try the question over again, at bar, the difficulties and expences Mr. *Smith* was laid under were prodigiously encreased. He had all his witnesses, many of whom were very aged and infirm, to collect from distant parts of the counties of *York*, *Westmoreland*, and *Cumberland*, and bring them to *London*, at an inclement season of the year.—Mr. Solicitor-General, from a consideration of these circumstances, entered heartily and warmly into the subject, of which he shewed himself to be complete master; he detected every fallacy, that had been offered in argument, he developed and exposed every false fact, that was endeavored to be established by evidence; and, though he was refused the inspection of some pieces of written evidence, which Mr. *Chaytor* produced at the close of the first day, imagining they would have given a *coup de grace* to the cause, yet Mr. Solicitor, not only obviated the force of any conclusions, which the other side had, with amazing confidence, drawn from these papers, but shewed to the satisfaction of the court, that, on a fair examination of them, they were the strongest and most conclusive evidence for Mr. *Smith*; nay, to such a degree, that (strange as it may seem) even his lordship's agents were *shamed* of the production, and endeavoured to shift the blame of it from one to the other. Mr. *Chaytor*, however, had been so sanguine in his opinion of their importance, that, long before the trial, he declared they would be decisive of the question.

THEY were equally unfortunate in their other piece of *written* evidence;—they produced the accounts of Mr. *Close* the receiver, to support and substantiate the evidence of a set of men, who were brought to prove that they had, for a course of years after Mr. *Smith's* purchase, got ore from a certain part of the ground in question, as being part of the wastes of the manor; but when these accounts came to be inspected and compared with the authentic documents of the very trust agents themselves, the fact turned out quite the reverse; for the accounts proved to demonstration, that these witnesses

were,

were, at the time they swore to, working in the *wastes*, at a very considerable distance from the place in question.—Though this piece of evidence was not found by Mr. *Chaytor* in *Pandora's box* at *Windsor*, yet, from a similarity of circumstances, it may be presumed it was his *happy* discovery.

IN such a contrariety of *viva voce* evidence it would have been very difficult for any jury to have distinguished truth from falsehood, unless they had previously viewed the place in question; this had been done by the juries who tried both causes; they were all gentlemen of the first character and property in the County of *York*; they cheerfully submitted to the inconvenience and fatigue of coming from very distant parts of it, into a rude country, for the single purpose of doing justice between the parties; and the last jury willingly undertook a journey to *London*, in the winter season, sat with the greatest patience, and strictest attention, near fourteen hours each day of the trial, without the least refreshment, and, after it was over, and they were informed that lord *Pomfret's* solicitor had receded from an agreement, made in court, for payment of a moiety of their expences, &c. they very generously accepted from Mr. *Smith*, a sum not equal to their travelling charges.

Mr. SMITH enjoyed his victory a very short time, but his representative is now in the peaceable possession of this mine; and however much Mr. *Smith's* estate may have suffered from this long and very expensive contest, yet he receives the singular satisfaction, and the event of this cause has shewn, that, while the noble institution of JURIES continues in this country, it will not be possible for any one, however exalted in rank, or countenanced or supported by power, to make depredations on his fellow subjects with impunity, or ultimately succeed in any plan formed against their property, which has not truth and justice for its support.

The

The Names of the Special Jury who tried the Cause, at the
Assizes at *York*, on *Friday* the 10th, and *Saturday* the 11th,
of *August* 1770.

Sir Digby Legard, of *Ganton*, Bart.

Peter Confet, of *Knayton-cum-Brawith*, Esq;

Gregory Ellsley, of *Filliskirk*, Esq;

Simon Butterwick, of *Thirsk*, Esq;

Gregory Ellsley, Jun. of *Patrick Brumpton*, Esq;

Mark Milbank, of *Barningham*, Esq;

Walter Hawksworth, of *Hawksworth*, Esq;

Benjamin Ferrand, of *St. Ives*, Esq;

Walter Vavafor, of *Weston*, Esq;

James Maude, of *Leathley*, Esq;

Roger Swire, of *Farnley-cum-Conningly*, Esq;

Robert Belt, of *Buttercromb*, Esq;

The Names of the Special Jury of the County of *York*, who tried
the same Cause at the Bar of the Court of *King's-Bench* at *West-*
minster, on *Saturday* the 7th, and *Monday* the 9th, of *November*,
1772.

Sir Bellingham Graham, of *Norton Conyers*, Bart.

Francis Smith, of *Kirby Knowle*, Esq;

Stephen Croft, the younger, of *Stillington*, Esq;

Wilmer Gosip, of *Upper Helmsley*, Esq;

John Sawrey Morritt, of *Rokeby*, Esq;

Randolph Marriot, of *Ayscough*, Esq;

Henry Wickham, of *Cottingley*, Esq;

Peter Wilson Overend, of *Bentham*, Esq;

Edward Foxcroft, of *Thornton-with-Burton*, Esq;

Joshua Field, of *Heaton-with-Clayton*, Esq;

Robert Grimston, of *Beeford*, Esq;

Robert Gee, of *Bishop Burton*, Esq;

Mr.

Mr. SOLICITOR GENERAL'S

ARGUMENT.

GENTLEMEN OF THE JURY,

I Am glad that an opportunity has been given me to request your *fresh* * attention to the stating of an entire new case: my learned friend, who opened this cause on the part of Lord Pomfret, had too much judgment, in stating his Lordship's case, to open to you any circumstances of that of Mr. Smith, of which you remain at present in ignorance; and I am convinced that no prepossession can dwell in any mind, with regard to a case of which they have not yet heard one circumstance disclosed: I have therefore to beg of you, gentlemen, to favor me with your indulgence, while I lay what I have to say before you in the following order.

* This cause began at eight o'clock on Saturday morning; the whole day was taken up in opening Lord Pomfret's case and examining his witnesses; at ten o'clock at night, Lord Mansfield directed Mr. Smith's counsel to open his defence, and although the jury had sat fourteen hours without the least refreshment, and though Mr. Smith's witnesses (most of them very ancient) were tired out with so long an attendance, it was with the greatest difficulty they could prevail to have it put off to Monday Morning.

A

I will

I will first state to you the defendant's case, as if this was the opening of a new cause; I will then go into an examination of the evidence you heard the other day: and close with stating to you the evidence that will be adduced on the part of the defendant in answer to that evidence, so far as it is necessary to be answered, and in order to establish the case of Mr. Smith, upon a ground totally distinct from any part of that evidence.

It has been stated to you, gentlemen, that the estate, which gives rise to this suit, was originally the property of the duke of Wharton. The disorder of that nobleman's affairs produced, so early as the year 1722, a deed, by which he conveyed all his estates to trustees, to be sold for the payment of his debts. The estate was taken into the management of the trustees: a bill was brought by the creditors for the execution of that trust in the court of chancery; and long before the duke's death, a receiver was appointed by that court, for the management of the estate. The cause lasted a great while; a great number of creditors was to come in and prove debts; and no steps were taken for the sale of the estate, till after the attainder of the duke. Upon that event, the Crown was pleased to grant to Lady Jane Coke, and Lady Lucy Morris, the duke's sisters, the reversion of the estate, after payment of debts. It turned out in fact, that there was nothing left of the estate but what was produced from the mines. In 1733, Mr. Close was appointed the receiver: the cause was carried on; and directions were given for the sale of the estates. In 1737 and 1738, the estates were sold: and you will be pleased, gentlemen, to attend to this circumstance, that all that in fact remained to the family, all the expectations they could entertain of any thing beneficial from the grant, were founded upon the prospect of *mines*; for every inch of landed property was sold, and the produce entirely consumed in the payment of debts. I speak of known facts; there was nothing left; nay, there were classes of creditors unsatisfied, and some of those postponed creditors, even since I attended the bar, have received a satisfaction out of part of the produce of these mines. Gentlemen, I point out this observation to you, because you will not think

think it possible, when the mines were the *only* estate to which the family looked, that the disposition of these mines, the description of them, the possession given, should have been circumstances carelessly attended to, or negligently transacted.

In 1738 Mr. Smith purchased the Manors of *Helaugh* and *Muker*, and some of the farms that lay within these manors, which the family of Wharton held in Swaledale. The manors consisted of considerable farms; and among others, of *Crackpot Hall Farm*. It was then let at 20l. a year, and was described to be in the occupation of *Simon Harker*. You will find by the evidence, that 20l. had been the rent of the farm for above fifty years before the purchase; and for thirty years since there never has been an advance of the rent. In the year 1770, Mr. Smith employed an improving agent to look over the estates, and even then, with all the advantages of the rise of rent, that farm was raised to, and is now let at only 26l. In 1738 Mr. Smith was let into the possession of the estate by Mr. Close the receiver, who had lived all his life time in the neighbourhood, and than whom no man had a better knowledge of the Wharton estate: he had been engaged as a considerable mine agent: from 1733 he had been the agent and receiver of this very estate; he could not possibly be ignorant of the extent and situation of it; and he could not be partial to Mr. Smith considering that he remained no agent for him, but he did remain an agent for the duke's sisters: and the only estate in which he could be an agent for *them*, was the mines that were reserved. It has been said, Mr. Smith saw the estate about the time of the purchase; if he did so, I believe he has never seen it since; and tho' he is a man of property in Yorkshire, I am certain he is totally unknown to any of you: he has for many years lived a recluse life, scarcely stirring out of his chambers in Gray's-Inn, almost entirely secluded from society, and, if it is possible to quote an instance of one man more singularly negligent of his affairs than another, it is Mr. Smith.

LORD MANSFIELD, then he must be either very rich, or very poor.

MR. SOLICITOR-GENERAL. Or very indolent.—Gentlemen, I speak of well-known facts, there is not a man in the world so singularly inattentive to his own concerns; nay, the very discovery of this mine (so much the favourite object of Lord Pomfret) was to him a matter of concern, as it involved him in this vexatious and expensive contest.*

In 1738 the purchase was made, possession was delivered. The purchase deed contained in it two reservations; one was of all mines within the *wastes* or *commons*; the other was of all subsisting bargains in any part of the estate during their continuance. You have already heard from one of the witnesses, and also from Mr. Attorney General, in his opening, that there was a bargain to one Fryar then subsisting on the place in question, and a trial making on *Beldy Hill*, the very place where the mine has been since discovered, Mr. Smith could not therefore immediately upon his purchase take any possession by mining in the ground in question, which on one side is called *Hall Moor*, on the other the *Hall*, or *Out Pasture*. In 1742, when the subsisting bargains were worn out, and the hopes of new adventurers were excited that mines might be discovered in Mr. Smith's estate, an application was made to him by Hartley and Parke: he let to them a lease, for twenty-one years, of a liberty to search for mines within his estate; this pasture was excepted in that lease. In 1743 they applied for a lease including this pasture, and Mr. Smith granted them one for the same term as the former lease in which it had been excepted. In this second lease, Mr. Smith granted them a liberty of searching for mines under the pasture commonly called *Crackpot Hall Out Pasture*. There would have been very little in this, if Hartley and Parke had not, as soon as they got this lease, immediately entered into possession. They

* Mr. Smith out-lived this trial but a few months: he had, however, the satisfaction of dying in quiet possession of the mines in question.

broke ground at Beldy Hill, sunk shafts, and dug for ore there: they carried on their workings in every year to 1747. There I stop; because it is a period at which I must state very particularly what happened. During the above years, they worked openly and visibly, and not with a few men; the fewest were four, sometimes the number extended to twenty or thirty. They had occasion very early in their trials to make a cross cut, which was carried a considerable length, and made at a considerable expence. What were the agents of the trust estate, and particularly Mr. Close, doing at this time? Were they ignorant, or at a distance from them? So much the reverse, they were working mines for the benefit of the trust estate on the other side *Swinnergill Beck*, in a constant intercourse with the different miners, and in a daily knowledge of the lessees works.

Having thus gone on for some time, and failed in their first attempt at Beldy Hill, the trial was deserted there; and in 1747, they betook themselves to that side of the ground next *Swinnergill Beck*, which was still nearer, nay even close to the trust mines. In 1747, the agents, who were carrying on the mines for Lady Jane Coke, began to attend to the works carrying on by Mr. Smith's lessees, because they were then carried on in such a direction, and so near, that it was necessary to see that they did not extend into the trust liberties. Application was therefore made (as was natural the mines being so contiguous) for leave to go down into the mines of Hartley and Parke to examine them, not under any idea that Close had a right to interrupt their workings, but merely as a matter of favor. After an examination of the mines on both sides, the directions that Close gave to the miners working on the trust estate, were, that they should take care to keep their workings on the trust side of *Swinnergill Beck*, so as not to go beyond the stone wall or boundary; that when their workings approached near *that* line, they should dial in their respective mines. Mr. Close himself had not only marked out the boundaries above ground, but he was so perfectly acquainted with the several rights of the parties, that he stated to the different miners the boundaries below ground, pointed out their several rights, and gave directions to
each

each party not to carry the works beyond their respective boundaries.

Gentlemen, this is not all, though that circumstance alone would be very strong; but it happened at that time that though the mines, which were working there for the trust estate, afforded no actual advantage, yet there were considerable prospects. Mr. Close therefore employed his field agents to examine from time to time, and make him weekly reports, not only of the actual state of their own workings, but of the general condition of the ground, and to make observations upon the bearings and directions of the several veins of ore in the lessees works on the opposite side of the Beck, and to see that each kept within their own boundaries. But it was not merely for these purposes that the field agents were employed by Close; there was a further view. It was conceived, that the workings carrying on by Hartley and Parke, would drain the works on the other side, by means of the level they would make, and enable Close to carry on his works by means of such level, his agents went therefore to view the state of Hartley and Parkes's work, in order to judge when it would be proper to commence their own.

Of this operation, as well as the other, weekly reports were made by the field-agents to Mr. Close; and at last, in the month of September 1747, they reported to him, that, from the condition of Hartley and Parkes's works, it was probable their level would soon have the effect to clear the mines on the other side, and that then it would be prudent for them to begin their own works. They were not mistaken in their conjecture, for the effect followed; and in a few weeks after the level had been carried to a certain pitch by Hartley and Parkes the trust agents and miners began their own works, and got lead to a considerable value, by means of that very level.

Gentlemen, if I was to rest here, I should think my cause sufficiently fortified, with regard to the state and condition of this ground, at the time of Mr. Smith's purchase. For if from 1738 to 1748, the first ten years after his possession, the agents of the trust estate, who must

must be acquainted with the nature of this property, in every respect, had admitted his right, had availed themselves of the workings under his right, not for the purpose of disturbing or interrupting him, but in order to work their own mines to advantage, shall we in 1772, be deemed better judges than Mr. Close, or the trust agents, of the condition of that property? But, gentlemen, it does not rest even here; I have stronger facts to state to you, than those I have opened.—

When Hartley and Parkes had carried on these works from 1747 to 1750, they began to find that the *expence* of getting was greater than the *profits* arising from the lead they found, they therefore, in 1750, came to a determination to abandon those workings. The consequence of which was this; it was in the power of Hartley and Parkes, by stopping, or breaking their own level, to drown the mines on the trust estate, and it was very fully their intention to do it; you may say it was unneighbourly; certainly it was so; but I believe it was that kind of conduct that opposite miners use to each other; for, if they cannot get, they do not chuse their neighbours should. Hartley and Parkes adopted this idea; and they gave notice to the agents of the trust estate, that they should let the water into their level, and drown their own mine; the consequence might have been, not only to have drowned the mine on the other side, but the miners also: the notice was therefore given, that the men might take care of themselves. Close was much alarmed at this; his mine was prosperous; and it was of great convenience to have the benefit of this level, and to prevent the mine being drowned.

Hartley and Parkes began their operation; and as they drew their water from what is called a race, which arose from a place confessedly part of the commons and beyond the northern boundary of the pasture, Close, when he had notice that the lessees intended to destroy the level and drown their mine, gave these directions to his agents, in order to frustrate the scheme: he directed them to go and cut the water off from above where Hartley and Parkes had a right to break ground;

ground; and to draw it off by a drain before it flowed into the pasture, and thus to prevent its coming into the mine; and he particularly instructed them to cut it off upon the moor, beyond the northern fence of the pasture in dispute, and for this clear express reason, because *within* the fence he had no right to break ground; but beyond that fence, which was common and waste, he had a right to make any trenches for the purpose of his mine: his directions, I repeat it, were:—"Go upon the moor; intercept the water before it comes into the pasture, but go beyond the northern fence of the pasture; and if we can draw off the water there, we have a right to do it." They went by Close's direction; they cut the water race upon the moor, close to the northern boundary, which he described as the fence of the pasture: and by this means they diverted the water and prevented it from drowning the mine. Hartley and Parkes were hereby for a moment disappointed of executing the scheme they had formed, but they still had it in their power to do it; for they let in water from another place upon the mine: they totally drowned their own mine, the consequence was, they drowned that of the trust estate.

Gentlemen, it does not rest here; it was of so much consequence to Mr. Close and his principals to keep up this level, (for it was the only level they had,) that they deliberated what to do upon it; they at first were advised (and that advice they actually carried into execution) to bring an action against the workmen, who wrought in Mr. Smith's ground, not an action for working in ground they had no right to work in; but the action was brought for using their own mines so as to drown their neighbour's: they were at last advised that instead of throwing away so much money upon a hazardous experiment at law, it would be better employed in making works to carry the water off. They accordingly dropt their proceedings at law, set to work, erected machines and made pumps to do the business which was formerly more effectually carried on by means of the level of Hartley and Parkes.

Now

Now, Gentlemen, permit me to make a pause here: and draw your consideration to the reflections that must naturally arise. Was Close ignorant of the rights of this estate? are we, I repeat it, can we be better instructed, is it possible in 1772 to understand the boundaries of an estate sold in 1738, better than the agent of that estate did at *that* time? was it possible for him to be negligent? What! when the interest of the estate, to which he was agent, called upon him to get what ore he could within this place; when he saw a prospect of profit there; when the interest of his employers absolutely required that they should have dominion over this very ground; though there had not been an ounce of lead raised within the pasture; nay, if there had not been an expectation to tempt any man to make trials there; yet at that time, for the mere object of *dominion* over the ground, it was of infinite consequence for the working their own mines, to assert their right to it; and, had they been conscious of having such right, this would have been their language. "This is not your ground; this belongs to Lady Jane Coke; she only has a right to work, you have no right to work it." That surely would have been a much more easy method of protecting their right than to have been at the expence of 4 or 500l. in making a new level to carry on works of their own, which was only necessary because they had no dominion over this part of the estate.

Hartley and Parkes discontinued their workings at that place, but revived them in another part of the same ground about a year after. I have stated to you the use of the ground from the year 1743 down to 1748, when this circumstance, so very memorable, happened. From 1753 down to 1762, another period of nine years, there never was a year in which there were not trials and workings in this ground, on the part of Mr. Smith's lessees; sometimes they were getting more, sometimes less; but they were continually making trials, and that in view of the trust agents and miners on the other side; what can be said in opposition to this sort of evidence? The Attorney General stated to you that there never were any mines wrought in this place till 1767, when this mine was discovered: there might, he said, be some adventurers trying their fortunes, and it was not to be wonder-

ed at, if no opposition was made to them by the trust agents, for in fact, those adventurers got nothing.

It is impossible, I am certain, that in a jury of twelve gentlemen of the county of York, there should not be some who have interest in mines; I shall to such therefore in the first place observe, that mens expectations are always full as great as the reality of any profit turns out. And I fancy, gentlemen, that if any of your neighbours were to begin working on your grounds, you would hardly wait to see whether they made any profit of that working: if they were opening mines upon your grounds, I presume you would think it highly proper to stop them, without waiting for the chance whether they made any advantage. In the next place, there is another answer; for whether profitable to the miners or not, it is most undoubtedly profitable to the Lord; for whoever gains or loses, if any thing is raised, it is all clear profit to him.

But it is unnecessary to search for other reasons, when the plain fact is a decisive answer: the mine *was* profitable; there was ore raised to the amount of near 3000 l. the Lord's duty, which was a sixth, amounted to 4 or 500 l. which was clear profit to the Lord. Now therefore if 3000 l. worth of lead was produced from these mines, what becomes of Lord Pomfret's argument? if the owners of the trust estate were to stand still till profit was made, certainly there was such a real advantage as well as prospect of future profit, that it is not possible to account for their neglect of it. But it is said the parties lived at a distance; the estate was under the management of agents who were negligent: you, gentlemen, know, that most mining estates are, from the nature of the property, under the management of agents. The negligence, if any, must then fall upon Mr. Close; for as to Lady Jane Coke, tho' she might live at a distance, she kept up a constant correspondence, and was by no means an inattentive or negligent woman: she was a very accurate, distinct, and intelligent person, and appears to have been much used to business.

Mr.

Mr. Clofe could not be *ignorant*; it is impoffible, that he fhould be *negligent*, his own intereft would prompt him to be active. But then a fuppofition is adopted, that Clofe lived in that part of the country, and was connected with the people there, and particularly with Parkes; and thus Mr. Clofe, from a connection with Parkes, (for with Mr. Smith he had none) is fuppofed to have been inattentive to his own intereft; for fo much as was received from the mines, fo much his profit increafed in proportion; and he muft, according to this pofition, betray the intereft of his employers, at the fame time that he gave up his own; this is an improbable fuppofition, was the fact true of his intimacy with Parkes; but on the contrary it will be proved in point of fact that Clofe and Parkes were in open enmity; that Clofe would have been glad to have done Parkes any ill turn he could: fo that you have every circumftance, his own intereft—his duty—the intereft of his employers—his refentment againft Parke, to induce him to be active: and there was but one fingle circumftance that withheld him from it, which was, the knowledge he had that this place was clearly the property of Mr. Smith; that ten thoufand people in the country could prove it to be fo; that it never had been difputed to be inclofed ground, nor ever would have been, if many circumftances, which I fhall ftate hereafter, had not concurred to make it more worthy to be the prey of thofe perfons who have fince extended their views upon it.

In 1767, fome time after Lord Pomfret's marriage, it happened that the adventurers under Hartley and Parkes, had made trials near Beldy-Hill, which place had, as I have before ftated to you, been the fubject of continued trials, in none of which they had been fortunate enough to hit upon the vein; but in 1767, it was difcovered under promifing circumftances; there was great appearance of an immense quantity of ore to be got at that place: at the fame time the works of the Wharton eftate were confiderably decayed; the profits of the agents were very fmall; the profits of the family were exceedingly reduced; I believe very little more was produced than paid the Duchefs of Wharton's jointure. In that fituation, the country talked much of the difcovery that had been made by Hartley and

Parkes, and the vast expectation of profit. On the other hand, all expectation of profit from the trust mines failing, some very active agents of Lord Pomfret, began to put themselves in motion: Persons who were of a very *different stamp* from Mr. Close; for had he been agent for the trust estate, he would not, I believe, have interfered. Mr. Hutchinson, who succeeded Close, and was as well acquainted with the estate as Mr. Close had been, was a man of credit and character in the country; he would not make any forcible entry, nor take violent possession of this mine, although repeatedly urged to it by Lord Pomfret; but rather chose to lose the receivership, than act what he thought (and he thought properly) an unjust and unwarrantable part: but there were agents of a very different complexion from either of these. There was a Mr. P'Anson, and a Mr. Metcalf.—I will not anticipate what the witnesses will say of Mr. Close's character, it was not only respectable, it was exemplary. I need not tell you, gentlemen, any thing of Mr. Hutchinson's character, it is very well known to many of you; for the same reason, I will not say any thing of the characters of P'Anson or Metcalf; they too are *universally known*. These agents said it was a very good thing to lay claim to this mine. I will do Lord Pomfret the justice to say, that I believe he was ignorant of the situation of it: his agents told him he had a right, and, if he believed them, it was certainly proper to claim it; accordingly a bill was filed in chancery by Lord Pomfret, claiming this mine. An answer was put in by Mr. Smith, stating the circumstances of his right and his Possession by repeated workings in this ground, with the knowledge of the trustees. Upon that answer coming in, application was made by Lord Pomfret to the court of Chancery in 1769, for an injunction to restrain the lessees from working, and upon a full hearing, that injunction was refused.

The court having refused the injunction, Lord Pomfret was advised, (not in Westminster-Hall but in the country) that injunctions in chancery were of very little use—that they were *modern* things; and that in *antient* times, Lords took possession of mines themselves: that they made use of their tenants to issue injunctions; so that the injunction

junction which the court of chancery denied him, the noble Lord thought proper to issue for himself. He made an entry, he beat the lessees workmen from the mine, and began (without the least color of law, but that law, which has been, thank God, many ages abolished in this country) to work the mine, and carried it on to a very considerable length. Application was made to the magistrates respecting this forcible entry, tho' to very little effect, for several reasons, which, gentlemen, you know; for those applications made a sufficient noise in the country, and the assizes at York have, more than once been acquainted with the circumstances of that forcible proceeding.* Mr. Smith, by this means, was compelled to become plaintiff in the court of chancery: he filed a bill to be quieted in his possession, and for an injunction, stating the same right as he had done in his answer. An application was immediately made upon filing the bill, to restrain Lord Pomfret from working upon this estate, of which he had never any other possession, than that which he had taken a month before in a forcible manner. Very unfortunately upon that application, by some mistake of the counsel, (for it could be nothing else) it was supposed that an injunction was something like an attachment; and because the affidavits only mentioned the names of P'Anson and Metcalf, and did not prove that lord Pomfret *personally* had made this entry, the injunction was granted to restrain only the *agents*; with a recommendation however at the same time to my Lord, as a matter of caution. It was said, "It cannot be supposed that a noble Lord would be guilty of such a conduct; it could only be the unauthorized act of P'Anson and Metcalf." But this injunction and

* Lord Pomfret having succeeded in his appeal to the House of Lords for a new trial, his agents in the country fancied that they too were above all law, and had a right to do whatever mischief they pleased; accordingly P'Anson the attorney, and Metcalf the mining agent, went with twenty or thirty of their accomplices to a smelt mill of Mr. Smith's eight or ten miles from the disputed ground, and destroyed it; for this fact, they were indicted and convicted of a riot at last summer assizes at York, and have since been condemned by the court of king's-bench, to pay Mr. Smith 400 l. for his damages and costs.

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the recommendation were of very little use to Mr. Smith; for, the consequence supposed by us, really happened. P'Anson and Metcalf were no longer employed as his Lordship's agents; but a brother of Metcalf's, and a brother attorney of P'Anson's, were immediately employed to work the mine; and the application, which was made just before the long vacation, was of no use to the parties; and P'Anson and Metcalf, under the names of their two substitutes, continued working the mine. Thus a very unusual event happened, a possession, which had continued thirty years without interruption, was taken away by violence. That violent possession held for above four months, and very considerable quantities of ore were got in that interval, and converted to the profit of Lord Pomfret.

Upon the sitting of the court of chancery in the next term, application was made to the noble Lord who presided with so much ability in that court, for an injunction; and upon Mr. Smith's undertaking to try the question of right, at the next assizes at York, an injunction was issued to restrain all the parties from working beyond a certain district called the *ten meers*. Mr. Smith without any delay, brought his cause to trial at York; the trial lasted two days; was tried by a jury who had all viewed the place in question, and before a judge of very great abilities, whose absence every person will lament at any time when business comes before this court: during the hearing he exercised the most meritorious patience, the most unexampled diligence; and at that trial, a most extraordinary thing happened; for in the course of two days hearing, in which the closest attention was given, to observe every thing that might convey an hint of the opinion of the judge or jury, neither I, or any of the other counsel, or the parties in the cause, were able to collect the least idea what opinion they had formed upon the question. After a full hearing, a verdict was given for Mr. Smith, to the satisfaction of all parties, but the party who lost, which is, I believe generally the case; for the losing party seldom thinks he has justice done him.

I shall here, gentlemen, say nothing of the jury who tried that cause; you well know that they are gentlemen of the first character in your county:

county: but I cannot pass over one circumstance which is not so generally known, but which does them infinite honor. After hearing the cause, they were libelled by every base publication, which could be thrown out in the news-papers,—by hand-bills dispersed about the country,—by *speeches at Market-crosses*. What was their conduct on that occasion? they thought, that it was their duty to their country, in respect to the institution of juries, which had been so grossly attacked, to apply to this court, where, regardless of rank and quality, the offender would have met with the censure, which so shameful a conduct richly merited: but the moment they heard there was an idea of an application for a new trial, they thought it would be improper in them to appear as parties in the business; they desired I would not move for an information; and to this moment such an outrageous injury to the institution of a jury remains unredressed. The verdict of a second jury, will be the best answer to all those infamous libellous publications.

I need not, gentlemen, state to you the variety of proceedings in the court of chancery, the struggles to obtain a new trial of that action,—the opinion of the learned judges,—and particularly of the judge who tried the cause,—the foundation which was urged by Lord Pomfret, as a ground for a new trial: nor will I state the proceedings in the House of Lords, upon his Lordship's appeal.* I will only say that the Lords *supposed* there was a ground, for what? not for a new trial, but for Lord Pomfret to be at liberty to bring an action; after the appeal Mr. Smith expected he would have directly brought such action, and it might have been tried almost immediately, at latest in the course of the ensuing summer. There was not a difficulty in Lord Pomfret's way to prevent his bringing that cause to a trial;

* It was thought an extraordinary circumstance, that on the very day this appeal was to be heard in the House of Lords, his Majesty should think proper to appoint lord Pomfret a privy counsellor. The order for a new trial was carried, on a division, by a majority of only six votes, sixteen being for, and ten against it.

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instead of that, instead of letting this question be tried under precisely the same circumstances as it was tried before, he deserted the remedy pointed out by the Lords, and prosecuted his own unnecessary bill in chancery; he sued out a commission for examining witnesses at an enormous expence, not one of whose depositions, his advisers must know, could be read in the court of chancery.* This conduct could not answer any one purpose beyond that of vexation and oppression, except the wretched purpose of fixing down witnesses to depositions, and by the examination on the commission, to have an opportunity of strengthening a little, the testimony that might be given.

This cause now comes a second time, gentlemen, to be tried; you have heard the evidence which has been given on the part of the plaintiff; and you must have observed from the questions which were put by us, that, excepting in one or two instances, it is the same evidence that was produced before; those circumstances in which it differs, I shall have occasion hereafter to comment very particularly upon; and I think I shall satisfy the court, that the auxiliary evidence in this business, (which I will pronounce to be surreptitious evidence,) could have been intended for no other purpose, but, if possible, to surprize the conscience of the court, and mislead the counsel, who were unacquainted with the nature of it; but when this evidence is examined, it makes not an Iota of difference between the cause as it now stands, and the cause as it stood before.

I come now, gentlemen, to consider the force of those circumstances in Mr. Smith's case, of which you have not heard any thing till to day; I have not hitherto stated to you any facts about fences, about depasturing, or any of the circumstances that the witnesses have mentioned. But the case I have opened to you is irresistible, even if we did not produce one of the many witnesses we have to prove the depasturing and the existence of antient fences prior to Mr. Smith's purchase.

This, I repeat it again, is an irresistible case. A possession delivered in 1738, and held for thirty years without interruption; and that possession

* These Depositions were contained in two thousand Sheets of Paper, and the Copy alone cost Mr. Smith 100*l*.

sion strengthened by mining during the whole time. It has been proved that in 1738, this place was delivered to Mr. Smith as a part of his purchase; each year that he has possession confirms the former; and if I had nothing else to offer for my client, I should not doubt your verdict upon the mere state of this case. I might boldly say, "this I purchased in 1738." How do you prove it? I prove it by the possession taken, I prove it by the possession continued, by the testimony of all the agents of the trust estate; I prove the strength of that testimony by stating the situations, in which it was their interest to oppose me if they could; but it was not possible to oppose me; because it was *then* the sense of all mankind, that this place was part of the estate that I purchased. And, gentlemen, I think no purchaser of an estate could dream he had an infirm title, if his possession had remained undisturbed during a period of thirty years; much less would he dream, that the possession was to be disturbed by the representative of the vendor of that estate, from whom he received possession. This gentlemen, is an independant case, if there was no other evidence; and I would give them all their boasted papers, all their testimony of their sheep-hoofs and right of common; and, after that concession, I would with confidence say, I am entitled to a verdict. If I am not, I do not know upon what ground any possessor holds his property. I am sure no purchaser holds it secure, if a vendor can at any distant period of time say, "It is true, I and my agents permitted you to possess this property; but we have discovered we were all ignorant; this matter is better understood now than it was when I sold the estate;" if this reasoning shall be once admitted, I am certain no man holds his property in safety.

You are now, gentlemen, to judge, or more properly to re-judge this case, and to determine, whether Mr. Smith shall enjoy in future, the remains of property which the expence of this dispute has left him. I am sorry to say on the part of Mr. Smith, that tho' in this contest he has succeeded in every step, yet his victories have almost undone him. Success is ruin to him. He was in possession, not of a very ample, but of a very easy *unincumbered fortune*; he was a man

in no *desperate circumstances*, which might induce him, as it has others, to try experiments; this vexatious and expensive contest is not of his own seeking; Lord Pomfret and his advisers have endeavoured to strip him of a great part of his property, and he is now, gentlemen, endeavouring only to preserve what he fairly purchased, against the claims of the representative of the family, under whom he so purchased.

Before I come to the second head, or observe upon the evidence given on the part of Lord Pomfret, I must beg leave to fix your attention to the point now to be tried. My learned friend had no interest to state the question in the precise terms that I shall. The question that you are now to try, is singly this, "Whether the ground in question *is* part of the commons or wastes of the manor, or not?" that is the single question, and I beg your attention to that; because I am not to argue, nor you to judge, whether it ever *was* part of the commons or wastes. I am not obliged to hold the system, that from the creation of the world, down to the present time, this has always been inclosed ground. I am to prove what it was at the time of Mr. Smith's purchase. This is not, gentlemen, a question for antiquarians to decide; it is not a question upon which the court or counsel can give you any assistance, as it is no point of law, but a mere plain matter of fact: is this ground part of the inclosure or part of the waste? has Mr. Smith a right to hold this piece of ground under a purchase he made thirty years ago? upon this question, the plaintiff undertakes to prove to you, and he must undertake it, that this ground at the time of the purchase was, and he goes further, that it *has since* been considered as waste. Now what it has since been considered, as applied to the plaintiff's case, is certainly of no more consequence than what it was a hundred years ago. For the point to which we must apply ourselves is, what this ground was *at the time of the purchase*.

LORD

LORD MANSFIELD.- What has happened since is only evidence of what it was before. You state the question properly, which is, what it was in 1738; *that* is the true question.

Mr. SOLICITOR GENERAL, It has been constantly possessed since 1738, and lord Pomfret's counsel feel the force of that observation; and to combat that, they have gone into evidence to shew, that since 1738, in the time of modern tenants, this ground has been constantly used as common; now that evidence does not go strictly to the case on either side; and the only reason why I go into the evidence is, because their witnesses have so much overshot the mark, as to destroy the credit of their testimony. If you had been told, that after the purchase, a system was formed to acquire the property of the mines in this place, and for that purpose it was necessary to exclude the neighbouring commoners, and consequently, that the use of the pasture had not been much since that time, but that before 1738, the place was common; *that* story would have been at least consistent; but the witnesses chuse to over swear it, they are decisive; they hold the place to have been most visibly and constantly used as common; nay, they carry it to such a degree of improbability, that they suppose Parkes to have made a fence merely for the purpose of fixing the property of the mine, and at the time he made that fence, to have told all the world he was doing it for that avowed purpose; and the witnesses tell you, that the fence was made by Parkes in such a direction, of such a form and figure, that it was notorious to every one who saw it, that it was not a fence for any other purpose, than for the purpose of the mine: and they add to that a most palpable absurdity; they suppose that Parkes was attempting to make this inclosed ground not for his own benefit, but for the benefit of somebody when he was dead and gone; and, to add to the absurdity, they prove, that, in order to deceive every person, Mr. Parkes was telling all the world the very purpose for which he intended it.

My learned friend very prudently passed over all the acts of ownership exercised by Mr. Smith's lessees for thirty years below ground.

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He has totally dropt all that was done beneath the surface, which is infinitely more material than what was done above ground: he has confined himself to an endeavour to prove the *use* of this ground as a common.

I come now, gentlemen, to consider the proof that has been given for lord Pomfret, which I shall range under three heads. The use and enjoyment of the pasture. The name and local description of the place: and the state and condition of the fences belonging to it. Under these three heads, the whole evidence that has been offered to you on the part of the plaintiff may be comprized. Now I will endeavour, under these three heads, to give you a short analysis of what the witnesses have said; and I will not attend particularly to each witness, except where it may be necessary to drop a few words upon the person's credit.

The first is, the *use that has been made* of this ground: I will make one preliminary observation, which I am sure you will agree is well founded, when you recollect the evidence. The use, which the witnesses swear was made of this ground, is as contrary to the system they mean to support, as I will shew you by our evidence, that it is contrary to truth. It is material to observe how much they destroy the system they meant to support. My learned friend called witnesses to shew the practice of this country, with respect to the commons. There are farms which lie at different distances along the river, *Gunner-side, Dykeheads, Ivelet, &c.* besides this Crackpot-Hall: you have been told, and I believe by your own observation you know, that, in these commons, it is usual for the several tenants in the neighbourhood to have their particular sheep-hoofs. It was opened to you, that Metcalf, Kearton, Alderson, and Whitfield, had their respective sheep-hoofs. It was also opened (with a view to obviate the evidence they knew would be offered on our side) that it is usual for the tenants to dog or hound off their neighbours sheep when they come upon their sheep-hoofs; that kind of dogging is very different from the hounding of sheep when they come upon a place where they have no right to

to come; in the former case they run the dog at the sheep, but it is merely to separate one flock from the other. It was also truly stated, and the thing speaks it, that the tenants have their sheep-hoofs on those parts of the wastes which are most contiguous to their farms or sheep-folds. Now, gentlemen, supposing for a moment, that this place was common, it is apparently the most contiguous to Crackpot-Hall farm; it is manifest it was stocked with Harker's sheep, and from thence they endeavour to account for the frequent use of it by Harker, and for the circumstance of his dogging off the sheep of other persons, of which we have ample and decisive evidence; this is the system laid down; and if the proof had been that the sheep of other people came there—that they followed the wind and rake, as the witnesses term it, and came upon this ground; that they were only driven or dogged when they got among Harker's sheep; that they came there without any molestation, and that he never pretended to claim any other right to that ground, but by the custom of the country, as his sheep-hoof: that evidence would have supported the opening, and have borne some semblance of truth. But you will recollect how far the evidence has gone; not content with proving that case, the object of the witnesses has been to represent to you that there were a variety of persons who had actually a right to sheep-hoofs on this place; these persons the different witnesses have enumerated, and they amount to twelve; they are the tenants of Ivelet, Calverty House, East and West Stonedales, and other farms which they mentioned.

LORD MANSFIELD. I think, to my memory, they have not named so many.

MR. JUSTICE WILLES. I have taken down twenty-three.

MR. SOLICITOR GENERAL. I believe, sir, you are more correct than I; but when I came to twelve, I stopt; for that number is just as good for my argument as twenty-three.

LORD

LORD MANSFIELD. They speak to the sheep-hoofs of different tenants at different times, especially while Harker and Metcalfe were tenants.

MR. SOLICITOR GENERAL. I have taken twelve of them all in *one* period. I dare say your lordship's notes are very correct; but take it either in the time of Harker, or of Metcalfe, and examine the witnesses, you will find they give you no less than twelve neighbouring tenants at one and the same time, who not only drove their sheep there, but all had their sheep-hoof upon the spot. I pointed the questions particularly, and the witnesses, on their present examination, went a great deal farther than upon the former trial. The reason is obvious; if they had only said, they saw sheep go there, and saw them driven off, whether by the owner or any one else, the observation would have been the same as on the former trial; but this certainly is not evidence of a common right. Instead, therefore, of proving they saw the tenants take their sheep away from the place, they swear they saw them put them on; and they have raised themselves to the idea, that it was *necessary* to prove that the different people, who they supposed to have the promiscuous use of this ground, had actually their sheep-hoofs upon it: nor is that all; for they all venture to be positive they never saw Harker drive any sheep from it. You will observe, that when they talk of his driving or hounding, they say, he drove his neighbours sheep *out* of Beldy Hill Cow Pasture into the place in question; and they say, that he drove his own sheep also. I do not in the least question it; for no doubt he would drive his own sheep if they came out of this pasture into the hay ground. Now, gentlemen, whether the ground in question was common, or not; if it is but supposed to be Harker's sheep-hoof, if Harker is but supposed to have a right to have his sheep there; is it not amazing, that scarce one of Lord Pomfret's witnesses could be brought to speak distinctly that they ever had seen Harker's sheep on the spot?

LORD MANSFIELD. Several have.

Mr.

MR. SOLICITOR GENERAL. Yes, my lord, but then they say it was by chance, and as a casual thing; none spoke of his having his sheep-hoof there. If Harker's sheep went there only in sight of his sheep-hoof, yet it is incredible that no one ever saw him drive off his neighbour's sheep. It was opened to you, and admitted as a fact, that he did so; and yet these witnesses who would have it supposed they very frequently observed this place, and had great reason to know it, do not allow that Harker ever hoofed his sheep there, or that he ever drove off those of his neighbours. This evidence goes so far beyond the mark, that it destroys all credit to their testimony.

Besides, supposing the number of persons who had sheep-hoofs upon this place to be only twelve, yet when they come to compute the stock belonging to these several tenants, they give to some four-score, to others five and six score; add them together, you will find that above *one thousand sheep*, at a moderate computation, must have been hoofed upon it. You, gentlemen, have seen the place, and therefore I need say little about it, it contains, 'tis true, two hundred and forty acres; but I am told it is the most barren spot in the kingdom; and if it had not been for the expectation below ground, it would not have been thought worth contending for. The ground, I am told by a good judge of land, is not worth more than nine-pence an acre; and I am likewise told, that the utmost quantity of sheep that could be stocked upon it is five or six score. As you have seen it, you are competent judges whether it is possible that the quantity of sheep they have sworn to, could be depastured upon this place, even supposing it common: their account surpasses all belief, nor can it be conceived why all the sheep of the country should have been so particularly fond of this spot; for the witnesses have in fact collected them all there. That they might have strayed there, may be very natural, but that there should be any inducement to the sheep to have taken that course, I cannot conceive.—Gentlemen, you will observe, that out of the number of witnesses (and they are not wanting in *number*) they have called only two persons who belonged to the family of any of the four successive tenants of the farm, *Jane Moore* and *John Harker*

Harker. All the connection that Jane Moore had with the family of Harker was, that she lived there the winter half year. The other witness, John Harker, is indeed a nephew of old Simon Harker, but he was not a hired servant with him; and all the account that he gives of his connection with the place, is, that he once staid six weeks on a visit with his uncle, when young. These are the only two persons they have called belonging to the families of the several tenants. Gentlemen, we shall produce on the other side seven or eight persons of the family of each of those tenants; some of great age from the family of Harker, some of very advanced years from the families of Metcalfe and Scot: they will give you an account of the use those tenants successively made of this pasture. I will not now anticipate that evidence, I only hint it to set in contrast the credit due to the account given by the one and the other.

It is remarkable, one of their witnesses, Simon Broderick, gives evidence of his own sheep going on this pasture undisturbed by Harker, and to shew you with how little accuracy their ideas are formed of it, he tells you at the same time, that his sheep had no right to go there, for he did not live within the manor; nay, even expressly stated, that he lived out of the manor.

MR. JUSTICE WILLES. He belonged to a neighbouring manor.

MR. SOLICITOR GENERAL. His sheep were bought *within* the manor; but I apprehend the sheep do not from that circumstance acquire any birth-right to live upon the manor, when their owner had no right: and yet this man, in just the same terms as the rest, talked of his sheep going undisturbed on this ground as a matter of right. This is an incredible circumstance; for, whether it was common or not, nay admit it to be common, this man's sheep had no right to go there; they were much more likely to go there if it was the private property of Harker, than if it was the property of all the tenants of the manor; because, as a collective body, they would be more vigilant about their right than any single person. As to many of the
other

other witnesses, you, gentlemen, must have observed the little degree of accuracy with which they speak. I do not wonder at it; I only wonder that being so little accurate, they dare to be so positive. I will give you one instance *of their extreme inaccuracy* when they descend to facts. James Hawkins, one of their witnesses, swears, that Edmund Coates depastured his horses on this place as on a common. Now I am amazed, gentlemen, at their venturing to repeat this circumstance, as the evidence on both sides is known; for we proved at York, and shall prove again, that this very Edmund Coates's cattle depastured there, and well they might, for he paid Harker for their feeding. We have Coates himself to prove the positive fact, and that goes much farther than any evidence of opinion.

Lord Pomfret's witnesses are not agreed in fixing, with precision, the season of the year when they saw the cattle feeding; neither are they accurate in fixing the precise spot on which they fed. As to their not fixing the season of the year, the effect of that observation I am sure you anticipate; but it may be proper just to mention, that it will appear to you in evidence, that this pasture was herded and hounded with diligence in the summer, in the winter no persons gave themselves any trouble about it, for a plain reason; it was in summer a benefit to have the grass, but in winter the pasture and the adjoining wastes were so much alike, that it was not worth while to employ a person to look after it. On this head of evidence I would observe, that the witnesses are in general extremely inaccurate; that, when they descend to particular circumstances, you will find those circumstances totally contradicted or explained away; that the witnesses, excepting the two I have mentioned, are no ways connected with the families of any of the tenants of the farm, and, in general, that they have prodigiously overdone the matter, and proved a great deal too much to deserve any credit.

There are two of the plaintiff's witnesses I must take a little notice of, Liddell and Whitfield; Liddell speaks to a circumstance, that if I understand his testimony *one way*, there is certainly very little in it,

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and it may be true; for I am willing to suppose, wherever it is possible for me to do it, that the witnesses have not wilfully adopted a story that has no foundation or color whatever. In many circumstances they swear falsely, without swearing wickedly; they form systems to themselves; they push their opinions farther than they ought; and, at a great distance of time, they misapply things and circumstances; and, though they swear wrong, yet it is not always with an intention to impose a falsehood. The account Liddell has given, is, that Metcalfe (who was tenant at Crackpot Hall after Simon Harker) claimed this place, with the common beyond it, as far as the northern boundary of the manor extended (which is above two miles) for his sheep-hoof; that he, Liddell, then tenant at East-fonsdale, insisted that his sheep-hoof was on that part of the common adjoining his farm on both sides the Beck, extending, on the east side, into the ground in question; which claim interfering with Metcalfe's sheep-hoof, they had a dispute about it, which, he says, was referred to Wilton, Mr. Smith's steward, who said, that Liddell had as much right on the east side of the Beck as Metcalfe. Now, gentlemen, you will recollect, Liddell, when pressed on his cross examination, told you, that though a few of his sheep might go on the place in question, yet the bulk of his sheep usually fed in the north part of the wastes. The other witness, Whitfield, affects to be much more pointed and decisive than Liddell, and therefore I must beg you, gentlemen, to attend very particularly to his evidence. He does not speak of the dispute as a matter of doubt, he swears positively the dispute was about feeding upon the ground in question, and as he was exact as to the place, I wished to bring him exact as to the time in which the dispute happened. He swears that it was the very next year after Harker quitted Crackpot Hall, which, it is admitted on both sides, was in 1740. He swears the matter was referred to Mr. Wilton, who called in the assistance of Harker, and that Wilton determined that Liddell had an equal right with Whitfield, to have his sheep-hoof upon the ground in question. Now, gentlemen, having fixed him as to place and time, I will prove to you, beyond a possibility of doubt, that the whole must be an absolute fiction; and I

am really concerned that the old man has been so very particular, because it is impossible for me to save the conscience of the witness, by supposing a confusion in his ideas. The fact was, and it will be proved beyond a doubt, that Wilson was not appointed steward till the latter end of 1741; he never acted as such, or ever went into that part of the country till the summer of 1742; so that it was impossible for any reference to be made to Wilson till above a year after the time which Whitfield has fixed as the date of that reference. This very circumstance, gentlemen, would overturn the whole of Whitfield's evidence, even if I had nothing to contradict it; but, gentlemen, when I come to produce Mr. Wilson, the very man to whom this reference is supposed to have been made, he positively and directly denies he ever heard of the existence of such a dispute, or that any such reference was made to him by Whitfield or Liddell.

I shall here close my observations upon the plaintiff's witnesses, with respect to the right claimed by the neighbouring tenants to sheep-hoofs on the ground in question; this evidence you will see abundant reason to pay not the least credit to; and, having overturned that evidence, I will now just give you a view of our evidence of the actual *use and enjoyment* of this place, by Mr. Smith's tenants, as part of Crackpot Hall farm.

I shall call seven or eight witnesses of the family of Harker, some of whom will speak to facts so far back as the year 1710, and *that* from certain knowledge; they will prove that Harker (who was fifty years tenant of this farm) used this pasture as his separate property; that he kept his own sheep there; that he drove off those of every other person; that he not only drove them off, but drove them off with an illegal violence; in short, that so far from there being no instance of his herding his own, and driving off those of others, the instances were frequent and repeated, many of them very outrageous ones; that the tenants of the surrounding farms have at times had occasion to complain of Harker's severity; and they went so far as to call a meeting for the purpose of consulting whether they should not

bring an action against Harker for not repairing his fences, and for hounding their sheep so violently.

They will also prove Harker's agisting not only his own cattle on the spot, but his taking in the cattle of others for hire : they will prove the existence of fences round the place long before the purchase ; that Harker repaired them, in a slovenly manner indeed, but still that they were repaired : they will prove the same facts in the time of Metcalfe, the succeeding tenant, that he had the like enjoyment of it as Harker had ; we shall likewise prove that Scot, the tenant that succeeded Metcalfe, took this very pasture as part of his bargain ; that he understood it to be part of the farm, and that while he was tenant, he enjoyed it as such : we shall prove by the family, by the neighbours on all hands, that it has been acknowledged to be the property of Harker, of Metcalfe, and of Scot successively ; that the sheep of the surrounding tenants sometimes came there ; sometimes the parties were neighbourly, sometimes not ; but that Harker, in particular, was extremely cross and sturdy in asserting his right to this place. This, gentlemen, is the evidence we shall produce, with regard to the use of the pasture ; and this evidence will infinitely counterbalance any thing that has been offered on the other side.

I next come to the proof of the *name and local description of the place*. Their witnesses call it *Hall Moor*, or *Hall Edge* ; we call it *Hall Pasture*, or *Out Pasture*. Had their witnesses proved only affirmatively that it was called by the names of Hall Edge and Hall Moor, that evidence would have been of little consequence ; for I have no doubt of its having different names given it by different persons, according to their different situations or residence. People who live contiguous to that part of a country which strikes their eye, are apt to call the place by that name. In this pasture there are places called by different names ; there is Swinnergill Edge, Hall Edge, and Cross Green Edge, so that Hall Edge is a known appellation ; it does not mean the whole, only a part, but may very often be used for the whole. Hall Moor was another term used by the witnesses.

I observed

I observed the plaintiff's council, in the opening, fell into a mistake, it was taken for granted, that *moor* and *waste* were synonymous terms; certainly they are not so; there are many places under the denomination of moor, that are not commons or wastes; Hall Moor does not imply that the place so called is a common: your own knowledge, gentlemen, will satisfy you that there are many places in the county that are called moors of different denominations, that have, as far as memory can extend, been inclosed and used as private property; but ground that is of a moorish quality will be frequently called by the appellation of *moor*.

As to the *name*, that would not have much deserved an observation, if the witnesses had only spoken to this place being known by the name of Hall Moor, and Hall Edge; but they have all sworn negatively, that they never knew it called by the name of Crackpot Out Pasture, or Hall Pasture, till this dispute arose. But there is one circumstance I must beg your attention to; when several of the witnesses were speaking of Harker's driving cattle out of a particular piece of ground, part of the farm, please to attend to the name they all use; they universally called it the *In Pasture*; he hounded his neighbours sheep out of his *In Pasture* upon the place in question. Now was there an *In Pasture* and not an Out Pasture upon this farm? They are all familiar with the term *In Pasture*, but totally ignorant of that of the *Out Pasture*.

MR. JUSTICE WILLES. I do not remember that circumstance.

MR. SOLICITOR GENERAL. William Close said, if they came into the *In Pasture*, they were dogged out upon the place in question.

JURY. Yes, he did say so.

MR. SOLICITOR GENERAL. And several more of the witnesses. But, gentlemen, this description of Crackpot Hall Out Pasture is far from being a new invention; it was the name used by Harker, and all the succeeding tenants; and indeed nothing could be so absurd as
to

to suppose that this name was first given to it in 1767: it is directly the reverse; for when Parkes took a lease in 1743, it is in that very lease expressly called Crackpot Hall Out Pasture; but then it was urged, this name was given it with a view to the mines. But, gentlemen, would any one be so ridiculous to take a lease of a place under a false description, in order for it to assume that name at the end of thirty years? it is incredible. When people take a lease they take it by a description agreeable to truth and to the common language used. If I take a lease of any man, certainly neither he nor I should call *Black-acre* White-acre, when we were wanting to ascertain what I took, and he lett; but it does not rest only upon that; the witnesses will give you an account of the Hall Pasture, or Out Pasture, being the well known name of the place, and they distinguish the In Pasture from the Out Pasture, in the same manner that some of the plaintiff's own witnesses have done. And is it credible that there should be an In Pasture and not an Out Pasture? Before I dismiss this head, give me leave to make one observation, arising from the indefinite description of Hall Moor; their witnesses have been pleased to call the whole extent of ground, northward of the farm, (which is some miles) Hall Moor; they do not stop short at what we call the northern boundary of the place in question, and fix its limits there; when therefore they speak of seeing sheep turned on, and feeding upon Hall Moor, and not being driven off, I say, when they do not particularize the place, and bring it to a specific spot, I can very easily, without imputing direct perjury to them, account for their swearing in that manner. They are misled by the Hall Moor's extending farther north; for it is certainly true, that sheep have been put upon, have been depastured, and have not been drove off Hall Moor: but when they apply their evidence of such facts to the place in question, that evidence is as certainly false. This confusion is easily brought about by a little *management*; the applying the name Hall Moor to two different places, misleads the witnesses.

I shall next consider the *state and condition of the fences*. You, gentlemen, can here judge yourselves of the credit that is to be given to

to the witnesses, when they tell you that there is not so much as a *foundation of a fence*; when the *gentleman-surveyor* (who was examined) comes to tell you of what was or was not to be observed of the existence of a fence, or the traces or foundations of walls and gutters, which, he says, he endeavoured to trace with his feet; there you certainly will not give more credit to that *gentleman's* nice feeling of his toes (even with the assistance of Mr. Chaytor) than you will to your own eyes.

MR. CHAYTOR. Sir, you made use of my name.

MR. SOLICITOR. Yes, sir, I did, and shall make much more use of it before I have done.—You, gentlemen, will give, I say, much more credit to what you yourselves have observed, than to any thing the witnesses can tell you, as to the present state and condition of the fences; it is therefore to no purpose to call witnesses to prove what either was or ought to have been shewn to you upon the view: the witness has spoken of gutters; some of you, gentlemen, said, that you did not remember any such as that witness described. If so, give me leave to say, that the conduct of the shewers for Lord Pomfret, on the view, was extremely unfair, if they did not shew you these gutters, when they intended to make use of them in evidence. You either saw this place, or you did not; if you was carried to the place, and yet was not shewn the whole of it when you was there, it is an unfair conduct; they ought to have shewn you all the bearings, points, and directions of the place; to leave it to your own eyes, and not to the eyes of people that are to give evidence here; so that whether you was shewn these gutters, or not, is immaterial to my argument; in one case, if you have seen them, the evidence will not gain credit; in the other, if you was not shewn them, you will not believe the evidence so unfairly introduced.

I will not trouble you with any evidence as to the *present* state of the fences; if the witnesses do speak to it, it will be from their own disposition to tell their own story; but I will not take up your time in asking

asking them about the state and condition of fences that you have actually seen.

It is very singular that the other side has only examined as to the state and condition of the *northern fence* of the pasture, they have examined nothing about the *eastern* or *western* parts of the fence. Their questions have all been, What have you seen on the north side, from the water rail to a place in Swinnergill called Hind Hole? and, I take it for granted, by their silence upon that head, that there is a good fence on the east and west sides, natural indeed in some places, but in others artificial. And, gentlemen, if I find three sides of a field actually inclosed, I am justified in supposing the fourth side must have been, or was intended to be inclosed; because I cannot conceive that any person would have erected three sides of a fence for no purpose at all; and the existence of fences on the east and west is just as material to the purpose of this question, and to Mr. Smith's title, as the existence of a fence on the north side of the pasture, and yet the plaintiff has confined his evidence merely to this, whether there was any fence on the north side.

I am instructed that you have seen the traces of a fence, not only on the east and west sides of the pasture, but also the traces of a fence on the north side; that there are stone walls built where the scars or rocks did not make a natural fence; that whenever the nature of the ground did not permit a wall to be made, there was a sod fence, with a gutter on each side, and you must have remarked that this is not modern work, or like those walls that are found in other places upon the wastes; for here are the regular vestiges of a wall at each angle, and there are in other places, if any person would take the pains (which the surveyor was too much a *fine gentleman* to take) to turn up the soil, they would find the regular and continued foundations of a wall and fence. This, gentlemen, I am instructed is the case, you best know whether it is fact.

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The question is not what the fences now are, but what they were in former times: you are told, indeed, by all the plaintiff's witnesses, that there are bits of old walls, but that they remember a certain period when there was nothing like a fence. No one, I believe, will suppose that we are talking of a fence sufficient to keep out Yorkshire sheep, the fence even of the In Pasture was not sufficient for that purpose; but it will be proved that there was a fence sufficient to turn cattle, in which there were driving gaps, and thirls for sheep to go through. But then Lord Pomfret contends, that this fence was first erected about the year 1746, and to prove that, witnesses are called in to account for the fences you have seen, and they boldly swear, that Parke made this fence in 1746, and that none existed before that period. The first of these witnesses is Whitfield, on whose evidence, on another occasion, I have remarked, he says, he spoke to Parkes's workmen while they were erecting this fence, and directed them to desist from making, what? why merely, according to his account, from making a gutter two feet broad and one foot deep: what reason did he give? lest he should lose his lambs in it. Observe the absurdity of the reason; for no man could be ever apprehensive of losing his lambs in a gutter of that size, and yet he is positive in his evidence. They have produced another witness, one Wilton, a chairman; you, gentlemen, observed in what manner he gave his testimony: he swears boldly, that he was employed by Parkes to make the fence in 1746; that he worked there; and he remembers the time particularly, because he had a quarrel with Edward Smallman, a fellow workman; that they fought, and he hurt his knee: he tells a story, that Parkes said, while the fence was making, that he believed they would remember it when he was dead and gone, and that he, Wilton, replied, he should remember his knee also. This is the evidence they have brought to prove that these fences were made by Parkes in 1746 with a view to the mines. We have, in contradiction to this, the most direct, flat, and decisive answer, they know we have; and I am therefore astonished they should risque the production of that fellow. Our answer so fully overturns his evidence, that it is, in fact, a contradiction to the whole of their case.

In the first place, as to this Wilson, he is a new acquisition, found in the streets of London since the last trial, for he was not produced at York; and what he has sworn, I boldly assert, is an absolute falsehood; that he ever worked in the place, is an absolute falsehood; that he ever had a dispute with Smallman, is directly false; that he was even in the country at the time he swears to the fact, is absolutely false; the whole of the story is merely an invention of the witness, without any other foundation or colour, than this, that he is the son of one Wilson, who actually was employed to repair this fence, and the brother of one Wilson, who also worked at it. If you recollect, gentlemen, he was by accident interrupted some time in the course of his examination; when the examination was resumed, he had lost himself, he could not take up the story where he left off: he told the counsel, "I must begin at the beginning again." The production of this man is the most outrageous insult to justice; for there is not a syllable of truth in his evidence: to contradict him, I shall call his father, his brother, I shall call Edward Smallman, and I shall call Pratt, they were all employed at the repair of these fences in 1746. I am sorry to say the father will be obliged to give you but a bad account of his son, and both father and brother, and Smallman and Pratt, positively swear, that this man never was employed about the fences; nay more, that he had actually left the country a considerable time before, and was, at the very time he swears to, a chairman in London.

LORD MANSFIELD. Was this witness examined under the commission?

MR. SOLICITOR GENERAL. He was.

LORD MANSFIELD. I ask, because of your being so prepared to answer him.

MR. SOLICITOR GENERAL. We had at York the father, the son, and Smallman and Pratt; they knew we were in possession of these witnesses,

witnesses, and yet the cause is so desperate, that they risque bringing even such a fellow as this, whose testimony they knew must be contradicted; it is bold! but where a case is desperate, people must run risques.

The fact, as to the repair of the fences, is this, and to support that fact you will find how immensely strong the proof is in favour of Mr. Smith. In the first place, Parkes neither made nor even ever repaired the fence, nay, had not so much as the least concern with the making or repairing of it.

Simon Harker, when in possession, before Mr. Smith's purchase, had made application to the agents of the Duke of Wharton to have this fence repaired, those agents pressed Harker to repair it himself, and gave as a reason, that the expence of herding was more than the expence of repairing would be: no, said he, I will not repair it, it will cost me too much; but I will repair it if you will allow me a year's rent. This the duke's agents declined to do; but after the purchase, Metcalfe, the succeeding tenant, in 1746, desired to have the fence repaired; he applied to Wilson, Mr. Smith's steward, to have the fence repaired; he agreed to do it, and, without any connection with Parkes, employed Wilson, the father of the chairman, to do the stone work: Wilson employed his other son, and Smallman and Pratt; he contracted for it at a shilling a rood for labour only; Smallman and Pratt were employed to do the sod fence, they worked by measure; Wilson, the steward, paid the workmen their bills, and charged it to Mr. Smith's account; and we will prove to you the sums allowed in those accounts. This, gentlemen, is the history of the repairing the fences, in contradiction to the evidence they have boldly and impudently produced on the other side; and give me leave to add that every one of our witnesses, who will prove this case, are men of good credit, character and condition; they will swear, that in repairing the fences, they followed the line of the old fence; that such line was, extremely visible to them; that they regularly took that as their course and direction; that they were directed to go by it, and that

they did not deviate an inch from it, nor make any fence where there was no fence before. I need not tell the jury, nor, in this stage of the cause, need I tell your lordship, that from the nature of the ground, in some places, and from the weather, frequent accidents must happen to a sod fence; that wet ground will often vary; the workmen therefore, to be certain of their line, took along with them old Simon Harker, who pointed out to them the course of this fence where it was obscure by the accidents I have mentioned; and I am told that severe weather will very much alter the appearance of these fences, especially when frost holds in. Our witnesses are all positive (and they give good reason for it), that they followed the line of the old fence, and that it was not a new work; but the foundation and remains of the ancient fence were extremely visible to any man who would chuse to see it; and some of the workmen will particularly tell you, that, in making the sod fence, they found buried under ground the old posts that had manifestly served for gate posts to catch the gate, to let out and drive in cattle into this pasture; and we shall prove, that in 1746, the fences were, previous to the repair, in much better condition than at present.

This, gentlemen, is a sketch of the evidence I shall lay before you as to the fence of the pasture, and I venture to state this evidence confidently; it has already been given at York, and had there its due weight. It is of immense consequence in this cause, to shew the existence of the fence prior to the purchase; and the use and enjoyment of the ground will weigh against a thousand witnesses, which cannot be answered by saying, that there are traces of fences on other parts of the moor of a similar nature.

Besides this, gentlemen, if I am not much mistaken, the witnesses will give you (for they have given it already at York) an account of other appearances in this ground; in ancient times this pasture was not all one single inclosure; there were within it two closes, that are now lying open, called Gill closes; in these places there are the remains of an house and out-buildings, the ruins of which, the witnesses

nesses will tell you; are visible to this day; that there are the traces of small inclosures round the house and buildings, which plainly indicate that some person had dwelt there; tradition says, and the old witnesses will give you an account of it, that in ancient times this inclosure was made for the Lord's deer, and the old people said the persons that kept the Lord's deer lived in that house; this is but tradition, but I think tradition will be as good evidence as the old papers, produced with so much exultation the other night by Mr. Chaytor.

LORD MANSFIELD. Are the High Gill Closes common?

MR. SOLICITOR GENERAL. There are High Gill Closes and Low Gill Closes. The Low Gill Closes are those I speak of, they were formerly taken out of this pasture, and are part of the two hundred and forty Acres.

LORD MANSFIELD. The High Gill Closes are common.

MR. SOLICITOR GENERAL. Yes: I am now furnished, (no thanks however to Mr. Chaytor) with an additional piece of evidence with regard to the northern fence of the pasture; for, if I am not much mistaken, one of the papers produced by him the other night, (*how* introduced I shall reserve for another consideration) contains evidence of *building* a wall which cannot apply to any other than the northern boundary of the pasture, and my reason for saying so, is this; that paper is, if I did not mistake, later in point of date than the other, (I speak from memory); I think it is a year after; the agreement is the last of the two; if so, then the other paper plainly and satisfactorily points out the closes of which the farm then consisted, and it points them out as *closes*; *ergo* they were manifestly *inclosed* in 1635; then in the next year 1636, there is an agreement, that the Lord shall *build* a wall on the upper side of the ground, from Stonesdale Beck to Swinnergill Beck: now if your lordship and the jury will only take the trouble of looking, for the purpose of the observation, upon the
map

map, it is most manifest, that, if a man knew what he was describing, this could never be the description of the wall, which they now contend to be the northern boundary of the farm. In the first place, it is not the upper side of the ground; it does not go in a line from Beck to Beck; it would be just as absurd in language to say, that it is a straight line from hence to St. James's by Charing-cross, as to say this goes in a direct line from Swinnergill Beck to Stonesdale Beck, for it goes in a line from Swinnergill to a place called the Smithy, then turns north a great way, and after that takes a western direction and comes down to Stonesdale Beck. Now no man that was treating about building a wall in the course and direction contended for by the other side would say, "I'll build you a wall on the upper side this ground from Swinnergill Beck to Stonesdale Beck," (which implies in itself that they are two places in a direct line from each other); no; he would say, "I will build you a wall from Swinnergill to the Smithy, from thence to such a place northward, and so to Stonesdale Beck." It is remarkable that there are no less than three lines in the course of that fence, which is supposed to surround all the parcels of land that are allowed to be the ancient inclosures of the farm. Now, gentlemen, you see by the map the effect of the observation. But it does not rest here only; the Lord is agreeing with his own tenant that he will build him a wall; their supposition is, that it was to be a stone wall to fence in all his different closes towards the north. I believe I need not tell you, gentlemen, that there could be no other fences there at that time than a dry stone wall. No one will imagine that in 1636, there could be good hawthorn hedges. The man treating with his own tenant, says to him, not that he will *repair* the fences, but that he will *build* a stone wall from Beck to Beck; one should naturally suppose, that these two points were to be approached in a straight line; no, say they, when the Lord says to his hind, "I'll build you a stone wall from Beck to Beck," he means, I will build you a stone wall on the line of all the old inclosures, according to the waving directions of these inclosures.

MR. JUSTICE WILLES. What is meant by the fire-house?

MR. WAL-

MR. WALLACE. It means a dwelling-house for the hind to live in, or an house with a chimney in it.

LORD MANSFIELD. You are, Mr. Solicitor, very correct in the paper, as you state it. I should be glad to have the topography taken; it may be material; I should be glad to know whether that course tallies with either of the walls.

MR. SOLICITOR GENERAL. That tallies undoubtedly with what we call the boundary, but the wall they contend for, manifestly does not go in a line from Beck to Beck.

LORD MANSFIELD. Do the two Becks go so low as to go to the east and west points of that wall?

MR. ATTORNEY GENERAL. The Becks both fall into the Swale.

MR. SOLICITOR GENERAL. But your lordship sees, that the wall inclosing cross greens in the map runs a great way north. The point between the Beck and the Swale does not make an angle in the farm, therefore the wall that they assign for our boundary, manifestly does not go from Beck to Beck; for from the Smithy it takes a northern direction to the top of Cross Greens, and then goes towards the Beck; it is, I am told, near a mile from the angle at which the fence quits that western direction and goes due north. It certainly is not the language of a man, if he understands what he speaks, to say, "I will build a stone wall from Beck to Beck," unless he means a wall which it is possible to carry in a direct line: if it is to be understood that the Lord was to build a stone wall, then it is manifest there could be no wall on the upper side of the ground before; and, if a wall was built in consequence of this agreement, it cannot correspond with any other than the wall we contend to be the northern boundary: it cannot apply to the wall they contend for, because *that* existed at the very date of the agreement itself, and therefore the expression
would

would have been, "I will *repair*," not *build* a wall from Beck to Beck.

Gentlemen, I have gone through the three several heads under which I purposed to range the evidence, and stated to you my observations upon it; I shall now proceed to take notice of the plaintiff's *auxiliary evidence*, which has certainly been fabricated since the trial at York. They knew the strength of our evidence as to the enjoyment of this pasture as part of the farm, without any claim or interruption since the purchase; they thought it prudent therefore to *procure* some evidence that would directly combat our proof, and the purport of that evidence is this; that for several years after Mr. Smith's purchase, there were some persons who actually worked, what they call waste bargains, on the west side of Swinnergill Beck, within the ground in question; that such bargains were taken of the agents of the trust estate; that they paid a duty to such trust agents on account of the ore they got; that these bargains were worked openly, and with the knowledge of the tenants of the farm, who never interrupted or molested them in their workings. To prove this story, they have produced one Askin, a man who ran away from the country near thirty years ago; he swears, that in 1739, he took a waste bargain of the trust agents on the west of Swinnergill, in the ground in question. That he and three others, whom he names, worked there for a considerable time; that they worked by means of a water race which flowed from above Hind Hole, in the place in dispute, which enabled them to wash or buddle the waste ore;—that, when he quitted the country, he sold his bargain to Robinson and Miller, who continued working on the spot for some years after.

Now, gentlemen, for a moment, I might admit the fact they have *attempted* to prove, and yet deny the conclusion they would draw from it. When Mr. Smith purchased, there were subsisting bargains; those were excepted in the conveyance to Mr. Smith; this might have been one of them.—In those waste bargains the party does not dig for ore, he only takes the refuse that has been left on the surface

surface by the former workers of the mines, *that* refuse they wash or buddle, and are paid by the parties, of whom the bargains are taken, such a certain sum of money for each horse-load or bing of ore they get from such refuse.

But, gentlemen, I have no occasion to explain their evidence by supposing this a subsisting bargain at the time of the purchase, when I have a better answer to make, viz. the whole of the story is a *direct falsehood*, and I am able to prove it so by irresistible evidence. It will be proved to you, that the waste bargain taken and worked by Askin and the people under him, was on the *east* side of Swinnergill Beck, within the *trust liberties*; we shall not only prove *that* fact, but also, that they never worked on the *west* side of the Beck; we shall go further, and prove it impossible that it could have been on Mr. Smith's ground; for we shall prove, that in 1739, there was no waste left by the former miners on that side of the Beck that was capable of producing an ounce of ore, and we shall prove there was waste on the *east* side of the Beck.—We shall prove that the very water race, which has been so confidently sworn to, and described to have been made in Mr. Smith's ground to enable them to wash and buddle, was actually on the *east* side of the Beck *within the wastes of the manor*, at a place called the Middle Tongue.—We shall prove this, not only by the evidence of Mr. Elliot and Mr. Stoddart, the trust agents, and many others, but also by one William Clarkson, who actually worked with Askin at this bargain at the time;—we shall, to close the whole, produce the accounts of Mr. Close, the receiver of the trust estate, which fix beyond a doubt Askin's, Robinson's, and Miller's working to have been on the wastes of the manor at a considerable distance from this pasture.—I should not have thought it necessary to have gone into evidence to contradict this proof, but I shall do it to convince you, that in every step they have taken to get out of the Difficulties this cause was attended with the last time, instead of extricating themselves, they have plunged up to the neck in falsehood; a conduct that is even a greater discredit to those that *procured* such evidence, than to the very witnesses themselves.

selves. As to Askin, I can have great charity for him, he lives at an inn in Staffordshire, and, at the distance of near thirty years, he is brought and shewn the spot, he is taken where they please to carry him, and then it is the easiest thing in the world, for artful agents (who stick at nothing) to make a man believe what they would have him believe.

Gentlemen, I have now done with the observations on the evidence on the part of the plaintiff; on the part of the defendant, I began with opening to you a case independant of any thing the plaintiff's witnesses either had or could swear; I shall proceed in that order, and shall call witnesses to shew to you the workings of Hartley and Parkes as lessees of Mr. Smith, from the time of his purchase; I will prove to you, that they entered in 1743, that they then began and continued those workings down to the commencement of the present dispute in 1767, without the least interruption on the part of the trust agents; I will prove, that the trust agents were acquainted with the condition of the estate, that they were men of honesty, vigilance and attention: I will shew you that it was their interest to attend to these workings; that it was even the interest of their passions to support the right of their principals. I will shew you that they were called upon every day to assert those rights (if they had any), it being of the utmost consequence to the enjoyment of their *own* mines to have the dominion of this place, in order to free those mines from water. That the ore raised within the pasture was of very considerable value; and at all events profitable to the lord; this will be the first branch of my evidence. I shall then proceed to prove to you, the use and enjoyment of the pasture as a seperate property, previous to the purchase, and during the whole of Harker's possession, as far as the memory of witnesses will reach. I will call all the family of Harker that are yet alive, by ill fortune two or three are dead since the last trial, but, by good fortune, enough are left to prove those facts. I will call all the family of Metcalf, of Scot, who succeeded Metcalf, all Tenants of the farm, and they will tell you what was their use, and what they understood to be their right. I will call to you witnesses

nesses to prove the hounding and herding of cattle from off the place in question. I will prove to you that Harker was called upon by the agents of the duke of Wharton to repair his fences ; that he pleaded his inability, unless they would allow him a year's rent ; that Harker turned off Metcalfe's sheep, and that, as soon as Metcalfe had an opportunity, when he became the tenant, he in like manner turned off even those of Harker : I will prove that so far from its being an accidental thing, or that he hounded only out of his other grounds, that he (Harker) hounded very roughly from off the ground in dispute ; he drove the sheep down the scars, and the owners complained of his breaking their necks ; that there was a general assembly of the tenants of Stonesdale, Ivelet, &c. that they had in contemplation to bring an action against him, not for the purpose of asserting their right to this place as a common, but for his not keeping his fences in repair, and hounding their sheep in the severe manner he did : I will prove, that with regard to all these tenants who are said to have exercised a right of common without interruption, that they have applied to Harker, they have begged he would snap only one dog, and drive their sheep more tenderly ; that they owned they were all at his mercy : I will prove that he has taken in cattle to agist, and that it was an avowed right in Harker, and the received opinion throughout the country, that he had such right equal with any other farmer in the country : I shall then, in the last place, call all the witnesses who speak of the repairs of the fence, the manner in which they were done : I shall prove they were not made by Mr. Parkes, but repaired by the steward, Mr. Wilson, at the request of the tenant, for the purpose of the farm ; that they were paid for by him ; that in repairing the fences he followed the line of the old wall ; that he made no new work, but went where the other had gone before.

Now, gentlemen, when I have proved what I have stated to you, I shall then have a good right to say, that the cause comes before you for your judgment, exactly upon the same evidence that it was tried by the former jury, who passed their verdict upon it. For after I have established this case, after I have proved the possession from the year

1738, both as to the mines and the pasture, without interruption; after I have proved the state and condition of the fences, I shall be extremely indifferent, whether the two papers, that were with so much exultation produced on Saturday night, were ever given into court or not; they cannot weigh a feather in this cause. The question to be tried is not what this pasture was in 1636, it is not a question which we are to have recourse to antiquarians to decide; the single question is, what was included in Mr. Smith's purchase; *that* is to be proved by the possession given *at the time* of the purchase, and the enjoyment *since*.

I cannot, however, pass over the *introduction* of these papers without some little observation upon them; they were brought in at the very close of the evening; they were read, not objected to; I do not know that any objection lies to them; I am very little acquainted with what they are; I took some minutes of them as they were read in court. When I went out of court, I desired to have copies of these papers, and did hope to have had them in time to have made some observations upon them, and to have had the assistance of the learned gentlemen engaged in this cause with me; we had a meeting yesterday at one o'clock; the copies had been promised by Lord Pomfret's solicitor; they were several times sent for, and Mr. Smith's solicitor went and compared the copies with the originals; but instead of delivering them, as was fully expected, they declined it; we sent again, and then the copies were flatly refused, and we were told the court had not ordered them. I literally and *bona fide* speak to your lordship and the jury, from such observations on those papers as I made in court on Saturday night; at one o'clock on Sunday we met, the copies were absolutely refused; after that, late in the evening, when it could not serve the purpose of our meeting, and when, I do upon my honor assure your lordship, they could be of no use to me, they were brought to Mr. Smith's solicitor; he thought it his duty to bring them to me; I then said I would not take the copies, they could be of no use to me.

LORD

LORD MANSFIELD. My copy did not come *till* the evening.

MR. SOLICITOR GENERAL. The copies were made in the morning, and existed at the time we sent for them.

LORD MANSFIELD. Certainly I would have ordered that you should have had copies, could I have supposed they would have made a difficulty of delivering them to you.

MR. SOLICITOR GENERAL. I know your lordship meant to order it, I had not an idea there could have been the least hesitation about it.

MR. ATTORNEY GENERAL. When I went out of court, I gave directions that they should have copies.

MR. SOLICITOR GENERAL. I have no doubt but the Attorney General's directions, and those of every counsel in the cause, would have been to give us copies; but Lord Pomfret's agents thought otherwise, and gave a flat denial *.

LORD MANSFIELD. The copies seem to be made with a correctness that requires an examination with the original, the copies are *fac simile* copies; my brother Willes mentions to me that he took away one copy that belonged to the council.

MR. WALLACE. That copy, my Lord, was not intended for us.

LORD MANSFIELD. But that was taking away one copy from them.

MR. SOLICITOR GENERAL. I urge it no further, I say no more about it; but desire that it may stand as an apology for me, if I state any thing incorrect about these papers.

* Probably by this time Mr. Clayton had found out his mistake, and, being ashamed of his boasted productions, was unwilling to have them any further examined into.

*I hope you will Excuse the Liberty taken
In Addressing these Lines to you*

[46]

LORD MANSFIELD. That paper you stated very correctly.

MR. SOLICITOR GENERAL: As to these papers, it is indeed a little necessary to inquire in what manner they were found, and by *whom* produced, and though I think there is no objection to their being admitted, yet, because a paper may be admitted without objection, it does not follow, that it should be admitted without enquiry; it is always necessary to authenticate them. Whence come they? what are they? I am told they are part of the Wharton papers relative to this estate; where come they from? where is this repository of the Wharton papers kept? is it kept for the benefit of the several purchasers? no; it is kept at the earl of Pomfret's at Windsor, who is representative of the vendors of those very estates. I am certain no purchasers of any part of the Wharton estates can hold themselves secure while lord Pomfret and Mr. Chaytor have possession of this *Pandora's box*. If these papers relate to the title, why are they not given to the different purchasers of those estates, to whom they certainly belong. Gentlemen, *who* found these papers? Mr. Chaytor; one who has been *unaccountably* active in this cause. I know he is a gentleman of an ancient family in the county of York, he once attended the bar; but I believe he has found that the *lead* we deal in, in Westminster Hall, was not so profitable as the lead that was found in Beldy Hill. *How* he has been connected with this cause I will not now repeat, *the stories on that head the country has heard sufficiently of*; I must however say, I wish some other person had attended the inspection of these papers along with Mr. Chaytor. Need I ask the question? had Mr. Chaytor found a paper which made for Mr. Smith, would he have produced it? Do you think, upon such an examination of these papers, that there would have been a fair production of them on both sides? Lord Wharton was an accurate man; there may be many reasons why this piece of ground was not included in the estimate they have produced; but if there had been bushels of papers that would have shewn these reasons, they would not have been produced by *Mr. Chaytor*. But, gentlemen, is the title of a purchaser to be affected by such a paper as this? for
even

even admitting it to be of great antiquity, yet it is not a record, but merely a paper found upon a search made by Mr. Chaytor among the papers of a vendor who has made reserves upon his estate, and produced against a *bona fide* purchaser. But, gentlemen, what is this paper of Mr. Chaytor's? if I understand it right, it is supposed to be an estimate made by lord Wharton of the value of his estate; it is no *rental*, it is nothing to *charge* his steward, or which could affect any third person; it is certainly no *particular* made by him for the sale of his estates; it is not made as introductory to any bargain between landlord and tenant; it is merely a computation of some kind, but yet *such* a computation as ought not, nay, cannot affect a purchaser; must we necessarily suppose that this paper contains, in point of quantity, all the parcels of ground that this farm then consisted of? it states the farm then to consist of 104 acres, in point of fact it consisted of 150 acres, exclusive of the place in dispute; but to solve that, they say the acres are computed ones; then they draw the inference, that computed acres, like computed miles, are one third more: I have a right to suppose they were field acres, if so, I know those are one third less, instead of more; but all this is mere guess work, it may be very ingenious, but God forbid that all this ingenuity of guessing should affect a purchase after a possession of thirty years.

I will, gentlemen, for argument's sake, admit that this place was formerly part of the waste of the manor, and yet are we to suppose that no title could be gained by any person to it as a private separate possession? if this argument prevails against such a possession as I shall prove, if against the evidence of the actual separate usage and enjoyment cotemporary to the purchase, any stress is laid upon such papers as these, no title is safe, no property is secure, the consequences of such a fatal principle are not confined to this cause, nor to the single subject of this dispute.

I observed, gentlemen, that Nan Intake (which is indisputably a part of East Stoneisdale farm) is, from the name, supposed by the other
fide

fide to have been part of the wastes. We are told by the witnesses, that the fences of that place are in as bad a condition as the fences round this pasture; I believe they may. The next attempt to be made by lord Pomfret will be at Nan Intack, and it is not the first time we have heard that the commoners would be instigated and supported to bring actions to assert a right to that place.

It is not, gentlemen, the property of Mr. Smith alone that is at stake, but all the property in the kingdom; if, by means of such loose papers as these, any estate can be proved to have been once a part of the common, the ground must be laid open to the common again; that is the inference that must necessarily follow; it is not confined to Mr. Smith, and the other purchasers of the Wharton estate, but the property of all the gentlemen in the county of York, and the neighbouring counties, wherever there has been a moor, stands on the most feeble, the most tottering foundation that can possibly be imagined. There is a gentleman, known to most of us who have gone the northern circuit, Mr. Graham, I beg leave to ask what was the condition of his cultivated fields in 1636. — If such boxes are to be searched and ransacked, if they are to be let loose upon a *bona fide* purchaser, the condition of his property is even worse than natural accidents can make it; Solway Moss is not so bad, so dreadful as that tremendous box that is kept by lord Pomfret and *searched by Mr. Chaytor*; volcanos, hurricanes, tempests, earthquakes, are not more pernicious; and if such papers are to be kept up, and then produced at the most distant period, to undermine a title, the lands in Yorkshire, which are now worth forty years purchase, will not be worth more than lands in the most desert parts of the kingdom. If such a possession, as I have opened and shall prove, will not defend your property, it is in vain to add years to years; not even centuries will insure your estates, they lie equally at the mercy of every invader; and if it was possible to pay the least attention to *such papers*, the best lesson and the best law you could learn by this journey to London, would be, to sell your estates in Yorkshire, put your money in the funds where neither lord Pomfret nor Mr. Chaytor could attack what
you

you have in your possession, and would wish to leave to your posterity as their inheritance.

I have gone through my observations on *Mr. Chaytor's papers*, and treated them with far more attention than they deserved—I have often heard it laid down, that against the lord of a manor, and even against a claim of the crown, such possession as I have stated, and shall undoubtedly prove, ought always to prevail; I ask no more in the present case than that it should prevail against the vague imagination that this place is a part of the wastes, and against idle conclusions of God knows what, arising from papers produced *God knows from whence*; all I shall now say is, what I began with, and with which I shall close; “I will prove the enjoyment of this pasture previous to, and at the time of the purchase; I will prove how it was held by the tenant in whose occupation it was described to be when Mr. Smith bought it; I will prove it by every act of possession, both above ground and below, from the time of the purchase to the commencement of this dispute; and I think when this is done, I have a right to say boldly and confidently of the truth of this cause (if I may be allowed to borrow a sacred expression) that “*The gates of hell shall not prevail against it.*”

F I N I S

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sent case than that it should prevail against the vague imagination that
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God knows what, arising from supposed God knows what
whereas, all I shall now say is, what is, what was, and what will
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tenant in whole occupation it was described to be when Mr. Smith
bought it; I will prove it by every act of possession, both above
ground and below, from the time of the purchase to the commence-
ment of this dispute, and I think when this is done, I have a right
to say boldly and confidently of the truth of this case (if I may be
allowed to borrow a sacred expression) that "The gods of hell shall
not give way against it."

